

The Oregon state seal is located at the top of the page, featuring a central shield with a plow, a sheaf of wheat, and a salmon, surrounded by a circular border with the words "THE STATE OF OREGON".

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

10 In Re: ) Bankruptcy Case No.  
11 RICHARD T. OGDEN and ) 04-60389-fra13  
12 JOYCE M. OGDEN, )  
12 ) MEMORANDUM OPINION  
Debtors. )

14 After a long and confusing financial ride, Debtors now seek  
15 refuge in Chapter 13. For the reasons set out in this opinion,  
16 confirmation of the Debtors' proposed plan will be denied; however,  
17 the Court will not, for now, foreclose any possibility of  
18 reorganization.

## I. PROCEDURAL ISSUES

20 The Debtors' proposed plan was filed on February 3, 2004  
21 (Doc. No. 11). The confirmation hearing was conducted, after  
22 several postponements, on September 15, 2004. Objections to  
23 confirmation have been filed by the Internal Revenue Service (Doc.  
24 No. 12), Oregon Department of Revenue (Doc. No. 14), creditors  
25 Gloria and Robert Jakobitz (Doc. No. 18), and the Trustee (Doc. No.  
26 45). The Trustee's objection includes a motion to dismiss the case.

PAGE 1 - MEMORANDUM OPINION

1       Mr. and Mrs. Jakobitz allege that Debtors are indebted to  
2 them because of events surrounding the sale of the Jakobitzes'  
3 business to a trust controlled by the Debtors. They have not filed  
4 a proof of claim. The Debtors assert that the Jakobitzes lack  
5 standing to object to confirmation because of their failure to file  
6 a proof of claim. They rely on In re Stewart, 46 B.R. 73 (Bankr.  
7 D.Or. 1985) (Hess, C.J.). In that case the Court held that an  
8 objecting creditor was not a "party in interest" because it had not  
9 filed a proof of claim. Since the creditor was not a party in  
10 interest, it had no standing to object to confirmation.

11      Code § 1324 provides that:

12      After notice, the court shall hold a hearing on  
13 confirmation of the plan. A party in interest may  
object to confirmation of the plan.

14      The term "party in interest" is not defined in the Code.  
15 Case law has characterized a "party in interest" as anyone with a  
16 stake in the outcome of the case. See Davis v. Mather (In re Davis),  
17 239 B.R. 573 (BAP 10<sup>th</sup> Cir. 1999) (party in interest includes those  
18 whose pecuniary interests are directly affected by the bankruptcy  
19 proceedings as well as those who have an interest in the property to  
20 be administered and distributed under the Chapter 13 plan); In re  
21 Amatex Corp., 755 F.2d 1034, 1041-44 (3d Cir. 1985) (anyone who has a  
22 practical stake in the outcome of a case); In re Johns-Manville  
23 Corp., 36 B.R. 743, 754 (Bankr. S.D.N.Y. 1984) (anyone who will be  
24 impacted in any significant way in the case). It is not clear that  
25 the interest has to be economic, or that the allowance or payment of  
26 a claim is the only basis for an "interest." A person may, for

1 example, have an interest in the outcome of a Chapter 13  
2 confirmation because the discharge in Chapter 13 is more extensive  
3 than that allowed in Chapter 7. § 1328. This is precisely why the  
4 Jakobitzes are objecting: they believe that Debtors' liability to  
5 them may be discharged in a Chapter 13 case, but will not be under  
6 Chapter 7.

In my view, the Jakobitzes are "parties in interest," and have standing to object to Debtors' efforts to discharge any debt they may have to the Jakobitzes. Had Congress intended that the right to object be limited to creditors, or holders of claims (each of which is defined), it would have said so. Since it did not, it stands to reason that the right to object under § 1324 is not limited to those who have filed a proof of claim.

## II. BACKGROUND

#### A. Debtors' Family Trusts

16           The principal feature of the Debtors' financial life is the  
17 creation of a series of trusts and limited liability corporations.  
18 The trusts were created with the advice and assistance of a company  
19 known as National Trust Services. The Debtors' intention in  
20 creating the trusts was to "avoid liability." In theory, the  
21 Debtors avoid personal liability respecting their business and  
22 personal transactions by conducting their financial life through a  
23 series of supposedly independent trusts. Of course, another way to  
24 characterize the arrangement is to say that the effect of the trusts  
25 is to put the Debtors' assets beyond the reach of their creditors.

1           At the center of the scheme is the Ogden Family Trust.  
2 Satellite trusts and LLCs include Oak Den (a pun on Ogden?) LLC, the  
3 Ogden Family Freedom Trust, said to be a charitable trust,  
4 Timberline Telecom LLC, the "Mom's Bus" Trust, and a number of other  
5 entities. The central trust was originally funded from the proceeds  
6 of the sale of the Debtors' home in California. There ensued a  
7 series of inter-trust transfers, including:

8           - Real property was transferred to the Southern Oregon Trust,  
9 controlled by the Debtors' parents. While the property originally  
10 belonged to the Debtors, or their trust, they are now paying rent to  
11 the parents' trust.

12           - The family trust transferred cash to the Freedom  
13 (charitable) Trust, which then purchased a van for the benefit of  
14 the Mom's Bus Trust. Mom's Bus was dissolved and the vehicle  
15 returned to the charitable trust, which in turn transferred it to  
16 another charitable trust controlled by a neighbor in Josephine  
17 County. The Debtors agreed to make monthly payments to the  
18 neighbor's charitable trust to pay for the van.

19           - One or more of the family trusts have made a substantial  
20 contribution to the legal fees owed personally by the Debtors.

21           B. Jakobitz Litigation

22           In April 1999, the Debtors negotiated the purchase from Mr.  
23 and Mrs. Jakobitz of the Jakobitzes' shares in ECI, a local  
24 telecommunications company. The purchaser was Oak Den Ventures, a  
25  
26

1 trust created by the Debtors.<sup>1</sup> The contract of sale provided that  
2 the Oak Den Trust would, for approximately \$590,000, buy all of  
3 Jakobitzes' shares in ECI Communications, Inc. In addition, the  
4 purchaser undertook to pay lines of credit owed to Wells Fargo Bank  
5 and American Express, which lines were owed by the corporation and  
6 guaranteed by the Jakobitzes. To secure payment, the sellers  
7 "retained" a security in ECI's receivables until the amount due to  
8 them was paid in full. However, ECT does not appear to be a party  
9 to the agreement, and there is no evidence in this record that ECI  
10 itself granted a security interest in any assets. Likewise, there  
11 is no evidence of any action to perfect the security interest,  
12 whatever it may actually have been.

13 Two other aspects of the transaction are worth noting: first,  
14 there was clear and unmistakable disclosure to the Jakobitzes that  
15 they were dealing with a trust, and not with the Debtors  
16 individually. Second, and related to the first: there is no  
17 provision for any personal guarantee of any obligation to Jakobitz  
18 by the Debtors.

19 Debtors' testimony at the confirmation hearing was that ECI  
20 had been losing substantial amounts of money every month, and that  
21 they were unable to turn it around. Jakobitz maintained that the  
22 real value of the company lay in the fact that it possessed a number  
23

24 \_\_\_\_\_  
25 <sup>1</sup> Strictly speaking, the Oak Den Ventures Trust was created by  
26 the Ogden Family Trust. Such niceties aside, all of the trusts and  
corporations involved were clearly under the control of the Debtors.

1 of accounts, which gave it value to larger telecommunication  
2 companies which were in the process of buying up smaller ones.

3 After the sale closed, Oak Den's trustees (in other words -  
4 the Debtors) caused ECI to transfer its receivables to a separate  
5 company controlled by the Debtors or their trusts. This company  
6 collected ECI's income, while ECI defaulted on its obligations to  
7 Wells Fargo, forcing a sale of ECI's assets that were collateral.  
8 Eventually, the collateral was transferred to yet another Debtor-  
9 controlled entity.

10 Jakobitz eventually sued the various Debtor-controlled  
11 entities, and obtained judgments finding the transfers to be  
12 fraudulent. There was, at the time this case was commenced, an  
13 action against the Debtors personally in the District Court for this  
14 district.

15 After the collapse of the telephone venture, Mr. Ogden  
16 obtained employment from a company called Silver Cache. Silver  
17 Cache is owned and operated by the Ogdens' son-in-law. Its  
18 capitalization and source of funds remain something of a mystery on  
19 this record. The company reported gross sales of between \$175,000  
20 and \$220,000 for its fiscal year of 2002-2003. However, it reported  
21 zero dollars in taxable income on its last returns.

22 Mr. Ogden is, essentially, a salesman for the company. He is  
23 paid \$2,600 per month. Payment is presently being made directly  
24 to him as what he characterizes a "W-2 employee." Previously, Mr.  
25 Ogden was paid by Ogden and Associates, LLC, which received payment  
26 from Silver Cache on account of Ogden's activities.

PAGE 6 - MEMORANDUM OPINION

### III. ANALYSIS

#### A. Good Faith

In order to confirm a plan of reorganization, the Court must find that "the plan has been proposed in good faith and not by any means forbidden by law;" Code § 1325(a)(3). This section requires more than an absence of illegality or malice.

[T]he proper inquiry is whether the [debtor] acted equitably in proposing [his] Chapter 13 plan. A bankruptcy court must inquire whether the debtor has misrepresented facts in his plan, unfairly manipulated the Bankruptcy Code, or otherwise proposed his Chapter 13 plan in an inequitable manner. . . . [T]he court must make its good-faith determination in the light of all mitigating factors.

In re Goch, 675 F.2d 1386, 1390 (9<sup>th</sup> Cir. 1982). A debtor's good faith should be determined on a case-by-case basis. Id.

13           It has been questioned whether a plan may be said to be in  
14 good faith if the debtor has liabilities that may be excluded from  
15 discharge in a Chapter 7 case, and the proposed plan is  
16 indistinguishable from a Chapter 7 in its financial effect. See In  
17 re Warren, 89 B.R. 87 (BAP 9<sup>th</sup> Cir. 1988); In re Le Maire, 898 F.2d  
18 1346 (8<sup>th</sup> Cir. 1990). The Debtors' case is indeed indistinguishable  
19 from a Chapter 7. They propose to pay \$100 a month for 36 months,  
20 resulting in an estimated 1% dividend to general unsecured  
21 creditors, and to retain their vehicle and other personal property.

If a debtor is devoting his or her entire disposable income to plan payments, however, the fact that the plan results in a low percentage repayment to unsecured creditors is not relevant in determining good faith. State of Oregon v. Seldon (In re Seldon),

1 121 B.R. 59, 62 (D.Or. 1990). Moreover, the mere fact that a  
2 chapter 13 plan proposes to discharge debts otherwise  
3 nondischargeable under chapter 7 is not sufficient in itself to  
4 prevent confirmation, Id, but is another factor the court may weigh  
5 in its good faith analysis.

6 The Jakobitzes assert that the Debtors' liability to them  
7 would be excepted from discharge in a Chapter 7 case under Code  
8 § 523(a)(2), (4) or (6). It is not clear on the record before the  
9 Court that this would necessarily be the case. There is no doubt  
10 that the Jakobitzes were mistreated by the Ogdens. However, it must  
11 also be said that the transaction was not structured in a way to  
12 give them much protection. There was no personal guarantee to  
13 ensure the Ogdens were ultimately responsible for payment. The fact  
14 that the Ogdens may have made it clear that they would not give a  
15 guarantee does not relieve the Jakobitzes of the obligation to  
16 insist on one if they want that sort of protection. It appears also  
17 that ECI itself did not give a security interest in any of its  
18 assets. In short, the Jakobitzes' dischargeability claims are  
19 problematical.

20 This is not to say that discharge in Chapter 7 would be a  
21 sure thing. There is considerable reason to believe that the  
22 Debtors cannot fully account for their financial history prior to  
23 their bankruptcy. It is also apparent that there were several  
24 transfers, including those that actually created the trusts, that  
25 were intended to hinder or delay creditors. If that is the case,  
26 discharge in Chapter 7 might be denied under Code § 727.

1       Finally, careful consideration should be given to the general  
2 prepetition history, which discloses a pattern of activity designed  
3 to thwart the interest of creditors. That these activities may  
4 continue is demonstrated by the fact that the Debtors have failed to  
5 wind up and liquidate their various trusts and other independent  
6 entities as part of their reorganization. Given the totality of  
7 these circumstances, the Court concludes that the Debtors' plan has  
8 not been proposed in good faith, and should not be confirmed.

9              B. Best Interest

10          The plan must provide for payment, over its lifetime, of an  
11 amount at least equal to what would be paid to creditors in Chapter  
12 7. § 1325(a)(4). This plan fails to do so.

13          The family car, which is provided for in paragraph 4 of the  
14 plan, was originally purchased for cash, with the money subject to  
15 the Debtors' control. They have now, through a series of  
16 transactions, transformed the arrangement so that they are making  
17 monthly payments to an entity that purports to hold the security  
18 interest. The transaction is a sham. There is no evidence that  
19 payments are actually being made, or that the purported secured  
20 creditor intends to enforce the agreement. What the transaction  
21 does accomplish is remove the value of the van from the best  
22 interest test, reducing the amount to be paid to creditors by the  
23 nonexempt value of the van.

24          Likewise, the record does not reflect adequate consideration  
25 for the transfer of the Debtors' real property to a trust controlled  
26 by their parents. The value of the estate's interest in claims it

1 or the Debtors may have against the transferees on account of these  
2 transfers must be included in the amount to be paid to creditors.  
3 Debtors argue that, to the extent there are fraudulent transfers,  
4 they can be recovered by the Trustee. Assuming this to be true, the  
5 Debtors themselves are not relieved of the requirement that the plan  
6 provide for payment to creditors of the value represented by those  
7 fraudulent transfer claims.

8           C. Feasibility

9           The Code requires that a plan be feasible. In addition, all  
10 priority claims, including those owed to taxing authorities, must be  
11 paid in full. There is evidence that a considerable sum of money  
12 was transferred from one or more trust entities to an attorney  
13 representing the Debtors individually. This is likely to be taxable  
14 income to the Debtors. 26 U.S.C. § 61. However, no provision is  
15 made in the plan for such tax liability.

16                         V. CONCLUSION

17           For the reasons stated herein, confirmation of the Debtors'  
18 plan of reorganization must be denied. The Court is not prepared to  
19 foreclose the possibility of reorganization altogether, and will  
20 therefore order that the Debtors, if they elect to do so, shall

21 // // //

22 // // //

23 // // //

24 // // //

25 // // //

26

1 submit a modified plan within 45 days of the date of the order  
2 accompanying this opinion. Should they decline to do so, or if the  
3 plan they submit cannot be confirmed, the case will be dismissed  
4 unless the Debtors elect to convert the case to one under Chapter 7.

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

  
FRANK R. ATTEY  
Bankruptcy Judge

PAGE 11 - MEMORANDUM OPINION